



## Scott E. Hennigh

Partner

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### PRACTICE AREAS

- Litigation
- Government Contracts & Regulated Industries
- Real Estate

### INDUSTRIES

- Construction and Infrastructure
- Insurance

### OVERVIEW

Scott E. Hennigh is a partner in the Business Trials practice group, and the Construction Team, in the firm's San Francisco office.

### Areas of Practice

Mr. Hennigh represents and advises clients in complex commercial matters, and has served extensively as lead trial counsel in numerous disputes. He has particular expertise in advising clients through all stages of projects involving private construction, public works, government contracts, and infrastructure.

He has successfully litigated cases involving contract procurement, intellectual property rights, false claims act defense, teaming agreements, unfair business practice allegations, delay and disruption, real estate acquisition, distressed projects, bankruptcy, fiduciary obligations, and insurance coverage. He relies heavily on his trial experience to develop practical avenues of advice on contract drafting and negotiation, and dispute avoidance.

### EDUCATION

- J.D., University of California, Hastings College of the Law, 1996
- B.A., University of Colorado at Boulder, 1990

### ADMISSIONS

- U.S. Court of Appeals
- U.S. District Courts for the Central, Eastern, and Northern Districts of California
- Ninth Circuit

### EXPERIENCE

#### Representative Matters

Lead trial attorney in arbitration concerning two 120-unit and 328-unit apartment complexes, each of which did not complete on time. The owner withheld progress and retention payments as liquidated damages, argued that the contractor had fraudulently misrepresented the project schedule, impacted project financing, and was not properly licensed. At various times the owners claims approached \$40 million. Representing the contractor, Mr. Hennigh defeated all claims, and successfully argued that the owner was liable for the contractor's extended duration costs, and its progress and retention payments. The award also included statutory prompt payment penalties for owner withholding project funds bad faith. The client was awarded approximately \$4.5 million

and awarded its attorney fees and litigation costs expended.

Lead attorney representing the Golden Gate Bridge's seismic retrofit contractor against its steel fabricator in competing claims of delay and disruption. Case settled before trial.

Lead trial attorney representing a payment and performance bond surety in defense of contractor claims on a hospital project. The contractor sued under California's prompt payment statutes claiming that project retention was due and owing. Mr. Hennigh developed a theory of defense that allowed him to obtain a non-suit on the first day of trial, resulting in a complete defense judgment and award of all litigation costs.

Representing an international contractor against a power company, Mr. Hennigh obtained an ex parte \$48M contract attachment lien. The opponents appeared at court with a "fool proof" maneuver to oust the court of jurisdiction. Mr. Hennigh's oral argument persuaded the court to rule in the client's favor. Renowned construction trial attorney and co-counsel John B. Clark stated "There are few attorneys alive that could have made that argument." Mr. Hennigh later created a maneuver allowing the lien to be levied against California pollution reduction credits, which are traded on a private market, and for which there was no specific statutory levy method.

Lead trial counsel in a defense of claims concerning a real estate transaction. The plaintiff claimed that the documents memorializing the transaction, which included a ground lease and a promissory note, required further payment. Mr. Hennigh developed an aggressive defense theory, derived from mortgage foreclosure law, that the plaintiff was entitled to nothing. He tried the case to a Federal jury, where cross-examination of the plaintiff's principal witness yielded several key admissions, and the jury returned a verdict in favor of the client.

Lead trial counsel representing a contractor in a public works construction dispute. The contractor's claims for increased costs due to defective plans and specifications, were set for jury trial in state court. The public entity counterclaimed for allegedly defective work. Three weeks in, the parties suspended the trial and ultimately settled. The case produced tangential claims of bad faith against insurance carriers through which Mr. Hennigh obtained a substantial settlement.

Lead trial counsel in a dispute with a masonry contractor constructing the Federal Court in Sacramento. The contractor sought compensation under the Miller Act for alleged extra work authorized in the field, and additional mobilization and demobilization costs. Mr. Hennigh tried the case in Federal court resulting in a judgment reducing the contractor's claim.

Lead trial counsel in a jury trial defense against a commercial contractor's claim that the plans and specifications were defective and ambiguous regarding the type of work at a commercial complex, and that the contractor had estimated the work at a lower price before signing the contract. Under threat of non-performance, the contractor secured a written amendment clarifying the work and for a higher price, performed, sued for non-payment, and set the matter for trial before a hopefully sympathetic jury. At trial after several days of witness testimony and argument Mr. Hennigh convinced the court to eliminate the jury, that the amendment was unenforceable, and to enter judgment against the contractor. The judgment included recovery of all litigation costs. Mr. Hennigh also successfully defended the contractor's appeal.

Lead trial counsel in a dispute involving a steel fabricator claiming that the project critical

path schedule was commercially impracticable, and that there were multiple misrepresentations before and during the project. The fabricator refused to perform, and the client terminated the contract hired a replacement fabricator. Both sides had competing claims and counter-claims seeking affirmative recovery. Mr. Hennigh tried the case in state superior court. The fabricator's principal made several key admissions on cross-examination. The trial resulted in a judgment for the client, elimination of counter-claims, and award of all attorneys fees, expert fees and costs. Subsequently the fabricator attempted to evade payment of the judgment by shifting assets to a third party and declaring bankruptcy. Mr. Hennigh oversaw a strategy, unexpected by the debtor, that inserted the client as trustee for the bankruptcy and resulted in clawing back all hidden assets from third party sources.

Lead trial counsel for a contractor on a competitively bid project to dredge Chula Vista and Newport harbors for a public entity. The actual quantities of dredge material differed from the amount depicted by the depth soundings in the plans and specifications, causing additional costs for extended onsite project duration and extra work to the contractor. The public entity argued for a different interpretation and calculation of the soundings, and launched a counter-claim arguing that the compensation requests and payroll records for past payment violated California's False Claims Act. Mr. Hennigh defeated the false claims allegations, tried the case in private arbitration, and obtained an award for the contractor as prevailing party.

#### **SPEECHES**

- "Pitfalls of Public Works Projects (And How to Avoid Them)," Sheppard Mullin co-presented with Heffernan Insurance Brokers (May 15 and 28, 2009)
- "Comparison between AIA Forms and Consensus Docs," Construction Claims in Public Works, CLE International (January 29-30, 2009)
- "Construction Payment Remedies," Nationwide Telephonic Presentation, Lorman Education Services (November 10, 2005; November 7, 2006)
- "Construction Law: Payment Remedies," San Francisco, Lorman (October 14, 2005)
- "Top Five Topics in California Construction," Speaker (False Claims and ADR), San Francisco, Acret and Lorman (March 25, 2005)
- "Change Orders: How And When To Use Them in California," San Francisco, Lorman (July 22, 2004)

#### **EVENTS**

- Pitfalls of Public Works Contracting (And How to Avoid Them) Seminar - Pleasanton
- Pitfalls of Public Works Contracting (And How to Avoid Them) Seminar - Silicon Valley